IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 700.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a Corporation, *Petitioner*,

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY, a Corporation, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

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McGUIN PUBLISHING CO., WICHITA

TOPICAL INDEX.

ALPHABETICAL INDEX TO AUTHORITIES.

ALPHABETICAL INDEX TO AUTHORITIES—Continued

ALPHABETICAL INDEX TO AUTHORITIES—Continued

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MAY IT PLEASE THE COURT:

Your Respondent, Employers Mutual Casualty Company, in opposition to the petition for writ of certiorari and supporting brief, respectfully shows to this Honorable Court:

A.
Summary of Matter Involved.

The summary statement at pages 2 to 6, inclusive, of Petitioner's petition and brief is, on the whole, adequate. However, we take the following exceptions thereto:

1. Petitioner's initial statement—that this action was instituted by the judgment creditor "of one insured under an automobile liability insurance policy" (p. 2)—assumes the very issue in controversy before the Circuit Court of Appeals, which issue was resolved against Petitioner.

2. Miller-Morgan did not, as is stated in the last sentence at the bottom of page 2 of the petition, specifically request that its policy contain an "omnibus or additional insured clause". It merely related to Respondent's agent a past incident against repetition of which it desired its policy to protect (R. 57). That an omnibus clause was essential to afford such protection is an assumption, only, of Petitioner.

3. At page 3 the petition states:

> "Miller-Morgan did not have knowledge of the attachment of the rider and did not consent thereto."

The undisputed evidence was that G. C. Temple, office manager of Miller-Morgan (R. 57), surrendered the policy to Respondent at Respondent's request, *for the express purpose of permitting Respondent to make a change in the policy* (R. 58, 67, 71). Respondent told Temple it wanted the policy in order to "have some of the provisions restricted from the policy" (R. 67). The trial court so found (R. 58). The rider was attached when the policy was returned (R. 58). Therefore, Miller-Morgan did know the rider had been attached, although it did not know, the court found, that the rider deleted omnibus coverage (R. 59)—i. e., the *fact* of the rider was known, although its *effect* was unknown.

4. The petition, page 3, states, "There was no consideration for the change in the policy", citing "R. 58". This is a conclusion of law, not a statement of fact. The only factual finding was that no premium was refunded (R. 58-59).

5. The last paragraph of Petitioner's statement (page 5, last three lines, and page 6) is purely argumentative. All contentions there urged are reiterated in the petition and brief, and will be disputed at appropriate portions of Respondent's ensuing argument.

B.
Questions Presented.

Although confined to the three questions posed by Petitioner (petition, p. 7), Respondent would suggest the following supplementation:

1. Question "1" should embrace these additional facts: (a) the "third party beneficiary" was not designated in the policy and was neither identified nor identifiable prior to the accident (R. 19); (b) the fact, although not the effect, of the policy change was known to the named assured (R. 58, 67, 71); (c) the named assured, and, after its disolution (R. 64), its trustees, were capable of litigating the issue of the rider's validity, but (d) although those trustees were parties to the instant action they did not elect to litigate such issue or seek affirmative relief, permitting judgment to go by default (R. 125).

2. Question "2" should, Respondent feels, quaere (a) whether the relevant language in the Kansas Supreme Court opinion is dictum, and, if so, (b) whether it be *obiter* dictum or *judicial,* considered dictum; (c) whether, if it be dictum, the Circuit Court of Appeals is *re-*

quired to *ignore* it (as distinguished from being compelled to follow it) in ascertaining Kansas law; and (d) whether it does conflict with an earlier Kansas decision.

3. Respondent likewise submits that question "3" should inquire whether the federal courts *may* — not "must" — *consider* — not accord authoritative effect to, necessarily—*judicial, considered* dictum of the state court where that state court has said its *obiter* dictum binds no one.

4. An additional, overall question is necessarily involved: whether, in any event, the issues in the case at bar are of such character and gravity as to warrant issuance of a writ of certiorari.

C.

Jurisdictional Statement.

(1) Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (Feb. 13, 1925, c. 299, § 1, 43 Stat. 938; Jan. 31, 1928, c. 14,§ 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926), being now 28 U. S. C. A. § 347.

(2) Judgment of the Circuit Court of Appeals was entered November 6, 1942 (R. 125). Petition for writ of certiorari was filed February 3, 1943.

D.

Opinions Below.

The District Court filed no opinion. Its findings of fact appear at pages 56 to 60 of the Record, and its conclusions of law at pages 60 to 61.

The opinion of the Circuit Court of Appeals is reported in 131 F. (2d) (Advance Sheet number 7) 802 (Nov. 6, 1942).

E.

Argument.

I.

The Circuit Court of Appeals Neither Accorded Undue Effect to the Kansas Supreme Court Opinion Nor Ignored Any Earlier Kansas Decisions in Point.

Petitioner first asserts the language of the opinion in *Stanfield v. McBride,* 149 Kan. 567, 88 P. (2d) 1002 (1939), relied upon by the Circuit Court of Appeals in determining the instant case, is pure dictum.

With this Respondent does not agree. True, the trial court in *Stanfield v. McBride, supra,* entered judgment for defendant upon the narrow, technical ground:

> "That is the relief sought to be obtained in this garnishment action, reformation of the policy, but reformation of an instrument is *not within the issues raised by the pleadings . . .* " (*Stanfield v. McBride, supra,* 149 Kan. at 569, 570, 88 P. (2d) at 1003; italics supplied.)

True, too, the Kansas Supreme Court, on appeal, affirmed that judgment. But it was not required, in so doing, to adopt the theory and reasons of the trial court (*La Harpe Farmers Union v. U. S. F. & G. Co.,* 134 Kan. 826, 8 P. (2d) 354, 1932; *Shelley v. Sentinel Life Ins. Co.,* 146 Kan. 227, 69 P. (2d) 737, 1937). Nor, Respondent contends and the Circuit Court held, did the Kansas Supreme Court in fact confine its opinion of affirmance to the technical theory of the trial court. This is not surprising inasmuch as the Kansas statute (General Statutes of Kansas, 1935, Chap. 60-948) provides there shall be *no pleadings* in garnishment actions, and there were none, in fact, in that case.

Since the Kansas Supreme Court felt the result reached by the trial court was correct, it quite properly affirmed the judgment although upon a different ground, thereby applying the rule that appellate courts should affirm any judgment wherein the trial court attains a correct result even though upon an erroneous theory (*State,* ex rel., *v. Iola Theatre Corp.,* 136 Kan. 411, 414, 15 P. (2d) 459, 461, 1932; *McKenzie v. New York Life Ins. Co.,* 153 Kan. 439, 441-442, 112 P. (2d) 86, 87, 1941).

Since the Kansas Supreme Court, in formulating the language relied upon herein by the Circuit Court of Appeals, was stating its reasons for affirming the judgment, which reasons were pertinent to the issues involved, Respondent submits that language is not dictum.

It should here be noted that the issue for determination on the instant petition is *not* whether the Kansas Supreme Court's rationale in the Stanfield case is *res judicata.* We are not concerned here with whether the Stanfield judgment was a final adjudication upon the merits or a simple affirmance of a procedural judgment. Nor is it material to the instant issue whether Respondent did or did not perfect a cross-appeal in the Stanfield case (Brief of Petitioner, pp. 25-26). Granting, *arguendo,* that the Kansas Supreme Court could not render a final adjudication upon the merits in view of the state of the record in the Stanfield appeal, and that in determining the effect of that opinion as *res judicata* only the judgment itself and not the reasons advanced by the court may be considered, it does not follow that those reasons are dicta. Irrespective of what *kind* of judgment the Kansas Supreme Court was authorized to render, the pertinent grounds upon which the court based that judgment are decision, not dicta.

Incidentally, we note that Petitioner construes the Kansas opinion as holding that Petitioner could not recover in that action *because Miller-Morgan was not a party thereto.* This appears inconsistent with Petitioner's contention that the Kansas Supreme Court merely affirmed the action of the trial court for the reason that reformation was not an issue raised by the garnishment pleadings.

Petitioner also argues (Brief, p. 14):

> "The Kansas Supreme Court could not have held in *Stanfield v. McBride, Inc.*, supra, that petitioner could not assert the invalidity of the policy change in an action to which Miller-Morgan was a party without indulging in dicta, because Miller-Morgan was not a party to the case being decided by the Kansas Supreme Court."

Even if correct, that statement is wide of the present mark. Respondent contends and the Circuit Court of Appeals held, that the *ratio decidendi* of the Stanfield opinion was not merely Miller-Morgan's absence as a party litigant, but, instead, was Miller-Morgan's failure to elect to litigate the issue of the rider's validity. That is, the Kansas Supreme Court held that until Miller-Morgan came into court and elected to rescind the rider, Petitioner had no cause of action. *Miller-Morgan's failure to so act was an existing fact in the Stanfield case* (as, also, in the case at bar). Therefore when the court held Petitioner could maintain no suit until and unless Miller-Morgan elected to rescind the rider, it was not enunciating dicta upon a supositititious state of facts not present in that case; and this is necessarily true even though Miller-Morgan was not a party to the Stanfield action.

Petitioner places considerable reliance upon the Circuit Court's statement that the Kansas Supreme Court, having held fraud was not within the issues of the garnishment proceedings, "*could have* doubtless stopped there" (Brief, p. 13; emphasis supplied). Respondent might question the correctness of the quoted statement since the Stanfield case also involved the question of lack of consideration and mutual assent, which issue was not disposed of by a holding that *fraud* was beyond the scope of the action. However, that the Kansas Supreme Court might have placed its decision upon a single ground does not establish that additional grounds actually adopted by the court constitute dicta.

It is not the practice of courts to rest their decisions upon a single ground or upon the narrowest possible basis of fact; on the contrary, every consideration directly controlling the actual issues tendered is a legitimate *ratio decidendi,* every proposition of law or fact presented which will defeat a plaintiff's claim is germane to the decision, and the court's opinion thereon is not obiter dictum even though that opinion also disposes of other propositions in a manner which would be determinative of the entire case. See *Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County, Iowa,* 182 Fed. 291 (C. C. A. 8, 1910). It is, in fact, well settled that an appellate determination upon one ground is not dictum merely because the court's conclusion on another ground would alone suffice to decide the case (*Florida Cent. R. R. Co. v. Schutte,* 103 U. S. 118, 143, 26 L. ed. 327, 336, 1881; *Weedin v. Tayokichi Yamada,* 4 F. (2) 455, C. C. A. 9, 1925; *Watson v. St. Louis, I. M. & S. Ry. Co.,* 169 Fed. 942, E. D. Ark., 1909, *aff'd.* 223 U. S. 745, 56 L. ed. 639; *Wagner v. Corn Products Refining Co.,* 28 F. (2d) 617,

D. N. J., 1928; *Parsons v. Federal Realty Corporation,* 105 Fla. 105, 143 So. 912, 1931).

Compare the rule, distinguishing between dicta and alternative propositions (*Maddox v. U. S.,* 5 Ct. Cl. 372, *aff'd.* 82 U. S. 58, 15 Wall. 58, 21 L. ed. 61, 1872), that if an appellate court bases its decision upon two or more distinct grounds, no one of those grounds may be labeled dictum, but each is the judgment of the court (*Union Pac. R. Co. v. Mason City & Ft. D. R. Co.,* 199 U. S. 160, 50 L. ed. 134, 1905; *U. S. v. Title Insurance & Trust Co.,* 265 U. S. 472, 68 L. ed. 1110, 1924; *Van Dyke v. Parker,* 83 F. (2d) 35, C. C. A. 9, 1936; *Union Pac. R. Co. v. Mason City & Ft. D. R. Co.,* 128 Fed. 230, C. C. A. 8, 1904; *Jones v. Mutual Creamery,* 81 Utah 223, 17 P. (2d) 256, 1932; *Coombs v. Getz,* 217 Cal. 320, 18 P. (2d) 939, 1933).

Certainly any given reason for a court's conclusion is not obiter dictum merely because another reason is more fully argued and considered (*Richmond Screw Anchor Co. v. U. S.,* 275 U. S. 331, 340, 72 L. ed. 303, 306, 1928); and where, as here, the theory in question furnishes the entire basis for the Kansas Supreme Court's decision, it cannot be regarded as dictum (*Eisner v. Macomber,* 252 U. S. 189, 204-205, 64 L. ed. 521, 528, 1920).

Since the Kansas Supreme Court based its opinion of affirmance almost entirely upon the ground that Petitioner could maintain no suit upon Respondent's policy until and unless Miller-Morgan, the named assured, elected to contest the rider's validity, and since that proposition was fairly presented to the court by present Respondent, and Miller-Morgan had not, in fact (and has not yet), so elected, Respondent submits the court's language is not dictcum.

Therefore there is no necessity to distinguish *earlier* Kansas decisions which Petitioner asserts to be contrary to *Stanfield v. McBride, supra.* Nevertheless, Respondent calls attention to the following distinguishing features of *Sluder v. National Americans,* 101 Kan. 320, 166 Pac. 482 (1917), the case upon which Petitioner relies.

The Sluder case involved a life insurance policy wherein the plaintiff-beneficiary, sister of the named assured, was specifically designated. As in all life insurance policies, the beneficiary there was the prime object of the assured's bounty; the policy was taken out essentially for the beneficiary's benefit. The policy in the Stanfield case was an automobile liability insurance policy purchased exclusively for the benefit and protection of the named assured (the Kansas "Financial Responsibility Act," making the carrying of such insurance compulsory, had not been enacted at the time in question—Kansas Laws 1939, Chap. 86). The omnibus clause, like nearly all provisions in this or any liability insurance policy, was likewise designed primarily for the named assured's protection — to safeguard him against liability in event his automobile became involved in an accident while being operated by someone who might, for example, be alleged to constitute his agent. The "beneficiary" was not identified in the policy, nor was he ascertainable prior to the accident. And, what is more important, such beneficiary could only be the fortuitous, incidental beneficiary of a contract of insurance purchased, without altruism, solely for the assured's protection. Thus, note the Kansas Supreme Court's characterization of such beneficiary as "a *volunteer* who has no interest in the matter" (*Stanfield v. McBride, supra,* 149 Kan. at 573, 88 P. (2d) at 1005; italics ours). Even

though, in general, the same rules are applicable whether the contract under consideration is a liability insurance policy or a life insurance policy, it is *non sequitur* that the rights of "beneficiaries" under each type of policy are identical.

Another distinction of note is that in the Sluder case the named assured was dead at the time the beneficiary instituted her action. There was no showing or contention that any successor, testamentory or otherwise, was qualified to maintain the action in the named assured's behalf. Therefore, unless the beneficiary were permitted to undertake the suit, the insurance company's wrongdoing would go unpunished and the decedent's wishes would remain thwarted. In the case at bar, Miller-Morgan, the named assured, could have instituted an action against Respondent to cancel the deleting rider at any time from September 5, 1936, the date of accident (R. 59), to July 27, 1937, the date the corporation was disolved (R. 64); and thereafter the corporate trustees could have done so.

Respondent submits the Kansas Supreme Court language, followed by the Circuit Court of Appeals in the case at bar, is not dictum, nor, in any event, does it conflict with the holding in the Sluder case.

II.

The Circuit Court of Appeals Did Not Accord to the Kansas Supreme Court Opinion Any Greater Weight Than It Would Receive in Courts of the State of Kansas.

III.

The Opinion of the Tenth Circuit Court of Appeals Is Not in Conflict With Decisions of the Fourth Circuit Court of Appeals.

Respondent will discuss these two questions together, although they are treated separately in Petitioner's brief.

It should also be percursorily noted that if the controversial language of the Kansas Supreme Court opinion is decision rather than dictum—as Respondent contends and has heretofore urged—then the above questions are moot. In this section of its brief, Respondent is assuming, for argumentative purposes only, that said language constitutes dictum.

Petitioner quotes from two Kansas Supreme Court opinions wherein that court has announced that its dicta binds no one. The quotations are themselves dicta, if tested by the stringent definition of "dictum" urged herein by Petitioner, but admittedly they state the law of Kansas—and of every other common law jurisdiction. Petitioner further cites two decisions, with which Respondent has no quarrel, by the Circuit Court of Appeals for the Fourth Circuit declaring its freedom to determine state law without reference to dicta in opinions of local courts.

Respondent's answer is threefold: (a) In none of the decisions cited by Petitioner is the important distinction between judicial dictum and obiter dictum involved or considered; therefore they are not authoritative on the question of the effect to be accorded judicial, considered dictum. (b) Because dictum *need* not be accepted, it does not necessarily follow that it *must be ignored.* (c) The reasons for the rule stated by Petitioner's authorities are inapplicable to the case at bar.

Considering the last distinction first, the Fourth Circuit Court of Appeals quotes approvingly Mr. Chief Justice Marshall's famous disertation on dictum wherein this explanation is advanced for the rule denying binding effect to obiter dictum (Brief, p. 22):

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, where the very point is presented. The reason for this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
>
> (*Cohens v. Virginia,* 6 Wheat. 264, 399-400, 5 L. ed. 257, 290, 1821).

In the Stanfield case, Respondent's brief and argument to the Kansas Supreme Court were devoted largely to supporting the trial court's judgment *upon the ground that only Miller-Morgan had any standing in court to attack the validity of the rider.* Present Petitioner fully covered this issue in its reply brief, and again in its petition for rehearing and in its motion to clarify. In its various briefs Petitioner explicitly pointed out to the Kansas Supreme Court all conceivable results which might stem from its decision, specifically calling the court's attention to the Sluder case, *supra.*

Therefore, the court's language in resolving this issue was not mere incidental observation upon collateral matters. The issue was "actually before the court" and was "investigated" with as much "care" as is given any determinative feature of any appeal. Nor could the court possibly have failed to anticipate the effect its language would have upon a second suit between the same liti-

gants wherein Miller-Morgan was made a party. When Petitioner states at page 26 of its brief, that:

> "The question of whether the invalidity of the attempted modification of appellant's [sic] insurance policy could be litigated in an ordinary civil action to which the other party to the contract, Miller-Morgan Motor Company, was a party, was not raised, briefed, or argued",

its assertion is subject to challenge. The issue may not have been urged upon the court in the precise phraseology adopted by Petitioner in the foregoing quotation, but undeniably the Kansas Supreme Court was pressed with the contention that only Miller-Morgan could attack the rider, and that unless it did so Petitioner had no cause of action against Respondent.

That being true, the reason for the dicta rule announced by the Fourth Circuit Court of Appeals as well as by the Kansas Supreme Court is not applicable to the case at bar; wherefore the rule itself is likewise inappropriate here.

Again, the Fourth Circuit Court's refusal to follow state court dictum in a given case, stating it was not *compelled* to do so, is not inconsistent with the Tenth Circuit Court's *voluntarily* determining the applicable Kansas law in the case at bar by resort to the "dictum" of the Stanfield opinion. Similarly, the Kansas Supreme Court rule that its dictum *binds* no one does not *preclude* the Circuit Court of Appeals' reliance upon local dictum as an aid in ascertaining Kansas law. The distinction between what one is compelled to do and permitted to do is obvious. Certainly instances are legion wherein

the Kansas Supreme Court has itself followed its earlier dicta.

Finally, and of controlling importance, the controversial language in the Stanfield opinion is, if not actual holding, at least *judicial* dictum. There is a marked distinction between *judicial* dictum and *obiter* dictum.

This distinction between mere *obiter,* which may, loosely, be characterized as discursive "asides" or passing expressions of opinion by a court or judge on collateral issues not directly involved and not briefed or argued by counsel, frequently constituting illustrative argument originating solely with the court, and *judicial* dictum—a direct expression of considered opinion deliberately passed upon by the court, although not essential to the decision—is well recognized by an abundance of authority. For example, see *Buchner v. Chicago, M. & N. W. Ry. Co.,* 60 Wis. 264 19 N. W. 56, 57-58 (1884); *Zeuske v. Zeuske,* 55 Or. 65, 103 Pac. 648, 651 (1909) (dissenting opinion); *Derosia v. Firland,* 83 Vt. 372, 76 Atl. 153, 155 (1910); *Scovill Mfg. Co. v. Cassidy,* 275 Ill. 462, 114 N. E. 181, 185 (1916); *Perfection Tire & R. Co. v. Kellogg-Mackay Equipment Co.,* 194 Ia. 523, 187 N. W. 32, 35 (1922); *Chase v. American Cartage Co.,* 176 Wis. 235, 186 N. W. 598 (1922); *Taylor v. Taylor,* 162 Tenn. 482, 40 S. W. (2d) 393, 395 (1931); *Crescent Ring Co., Inc. v. Travelers' Indemnity Co.,* 102 N. J. L. 85, 132 Atl. 106, 107 (1926); and *Chance v. Guaranty Trust Co. of New York,* 164 Misc. 346, 298 N. Y. S. 17, 22 (1937). Compare *Carstairs v. Cochran,* 95 Md. 488, 52 Atl. 601 (1902), and *People's Lumber Co. v. Gillard,* 5 Cal. App. 435, 90 Pac. 556, 557 (1907).

A typical expression of the distinction is thus given in *Taylor v. Taylor, supra,* 40 S. W. (2d) at 395:

> "The reply of learned counsel for appellant is that . . . the expressions relied on are dicta only.
>
> "We are unable to agree with counsel in thus restricting the weight to be given the pronouncements quoted. The distinguished writers of these opinions did not use language loosely, or announce lightly constructions of important statutes. It is true that . . . an opinion is properly construed in connection with the facts of the case. But, even though not essential to the decisions of the case, a statement in the opinion upon a point even incidentally involved, where apparently made with consideration and purpose, is at least a judicial dictum, as distinguished from mere obiter dictum, and is entitled to great weight. Moreover, in so far as an opinion announces principles as a basis for the decision, it is in no sense dictum."

Respondent submits the language in the Stanfield opinion with which we are here concerned is, if not actual decision, at least *judicial* dictum. The Kansas decisions cited by Petitioner, announcing generally that dictum binds no one, do not purport to weigh the persuasive value of judicial dictum, and cannot be said to condemn the judgment herein of the Tenth Circuit Court of Appeals.

By the same token, there is no conflict shown between the instant judgment and the Fourth Circuit Court of Appeals' decisions cited by Petitioner. Those decisions merely state that in determining local law the circuit court is not required to heed state court dictum. They make no mention of *judicial* dictum, speaking only of "mere dicta" (Brief, p. 21) and "dicta *or other chance expressions*" (Brief, p. 23; italics added) which indi-

cates, plainly, that the Fourth Circuit Court of Appeals was considering mere *obiter* dictum. If such expressions suggest a "conflict" between the Fourth and Tenth Circuit Courts of Appeal, Petitioner might well have enhanced its conflict by referring to other decisions from other circuits which take the same, traditional view towards *obiter* dictum—as, for example, *Parker Bros. v. Fagan,* 68 F. (2d) 616 (C. C. A. 5, 1934), and *Buder v. New York Trust Co.,* 107 F. (2d) 705 (C. C. A. 2, 1939). For that matter, see *Slatterlee et al. v. Harris et al.,* 60 F. (2d) 490, 491 (C. C. A. 10, 1932), decided by the Tenth Circuit Court of Appeals itself.

There is no necessity whatever for this Court to reaffirm its long held position as to the effect of obiter dictum. Nor is the fact that *Erie Rly. Co. v. Tompkins,* 304 U. S. 64, 82 L. ed. 1188 (1939) is of fairly recent vintage, of any moment. The precise question as to the effect of state dictum upon federal decision frequently arose under *Swift v. Tyson,* 16 Pet. 1, 10 L. ed. 865 (1842), which decision, *so far as it went,* laid down the same rule for which the Erie Railroad case is known. This Court's determination of the problem is unambiguous and needs no restating. See, for example, *Carroll v. Carroll,* 16 How. 275, 286-287, 14 L. ed. 936, 941 (1852).

Equally clear, Respondent submits, is the rule as to judicial, considered dictum. Squarely in point, and fully supporting the action of the Tenth Circuit Court of Appeals in the case at bar, is *Hawks v. Hamill,* 288 U. S. 52, 58, 77 L. ed. 610, 617 (1933) where Mr. Justice Cardozo, speaking for This Court, wrote:

> "Indeed the radiating potencies of a decision may go beyond the actual holding. A wise comity has decreed that deference shall at all times be owing,

though there may be lacking, in the circumstances, a strict duty of obedience. [Citation] An opinion may be so framed that there is doubt whether the part of it invoked as an authority is to be ranked as a definite holding or merely a *considered* dictum. What was said in Okmulgee v. Okmulgee Gas Co., 140 Okla. 88, 282 Pac. 640, supra, as to the meaning of perpetuities, was probably *intended* to be a definitive holding. [Citation] To be sure there is room for argument that limiting distinctions will have to be drawn in the future. We must leave it to the courts of Oklahoma to declare what they shall be. But the result will not be changed though the definition of perpetuities be something less than a decision. *At least it is a considered dictum, and not comment merely obiter.* It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement." (Emphasis supplied)

It was held, in *Yoder v. Nu-Enamel Corporation,* 117 F. (2d) 488, 489 (C. C. A. 8, 1941):

"In the application of a state statute, the federal courts are, of course, bound by the construction made by the courts of that state. [Citation] And the obligation to accept local interpretations extends not merely to definitive decisions, but to *considered* dicta as well. [Citations] Indeed, under the implications of Erie Railroad Co. v. Tompkins, 304 U. S. 64 . . . and West v. American Telephone and Telegraph Co., 61 S. Ct. 179, 85 L. Ed. 139, where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications *and considered pronouncements.* The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing

> manifestation of local law, having a clear root in judicial conscience and responsibility or obvious implication and inference, should accordingly be given appropriate heed."

Compare, *Jones v. Habersham,* 107 U. S. 174, 179, 27 L. ed. 401, 403 (1883), holding that federal courts, in following state law, will treat as "decision" any issue which the state court thought involved, and determined, even though the decision may literally have been de hors the issues presented by the case. See, also, *National Bank of Oxford v. Whitman,* 76 Fed. 697 (S. D. N. Y., 1896), which follows, by according it strong persuasive force, a "considered" dictum of the Kansas Supreme Court. And compare *Shanks v. Travelers' Ins. Co.,* 25 F. Supp. 740 (N. D. Okla., 1938), wherein Mr. Justice Kennamer follows a state court opinion on a point which the state court need not have determined, and *Cold Metal Process Co. v. McLouth Steel Corp.,* 126 F. (2d) 185 (C.C.A. 6, 1942).

Respondent submits: (a) there is no conflict between the Tenth Circuit Court's *voluntarily* following a considered, *judicial* dictum of the Kansas Supreme Court, and the Fourth Circuit Court's refusing to be bound by *obiter* dictum, nor between the action of the Tenth Circuit Court and the Kansas Supreme Court's concession that its *obiter* dictum binds no one; (b) the Tenth Circuit Court of Appeals had ample precedent for giving persuasive effect to the instant judicial dictum; and (c) the position of This Court is well known and requires no reiteration to avoid any supposed conflict in circuit court practices.

IV.

The Circuit Court of Appeals Did Not Err in Its Interpretation of the Kansas Supreme Court Opinion in Stanfield v. McBride.

Petitioner's final contention is that the Tenth Circuit Court's opinion misinterprets the decision of the Kansas Supreme Court in *Stanfield v. McBride, supra.*

First (Brief, p. 24), Petitioner attacks the rule of *Stanfield v. McBride, supra,* as undesirable in that it sanctions fraud and permits a wrong without a remedy. Respondent does not concede such accusation. However, a complete answer, in any event, is that the *desirability* of the Kansas rule of law is not open to inquiry upon petition for writ of certiorari. Whether the rule of *Stanfield v. McBride, supra,* be good or bad, if it is Kansas law the Tenth Circuit Court of Appeals cannot be criticised for following it.

Petitioner next says the Kansas trial court, in the Stanfield case, placed its judgment upon the ground that the relief sought was beyond the scope of a garnishment proceeding; that Respondent perfected no cross-appeal from that judgment; and that, for this reason, the Kansas Supreme Court was powerless to do more, in affirming the judgment below, than approve the trial court's conclusion (Brief, pp. 25-26). Yet Petitioner then goes on to urge that the holding of the Kansas Supreme Court was that Petitioner could not recover in that case because Miller-Morgan was not a party thereto (Brief, p. 26). These arguments appear irreconcilably inconsistent to Respondent. Nor, as has heretofore been demonstrated, is either argument meritorious.

Petitioner also states (Brief, p. 29) that the case at bar is "vastly different from" *Stanfield v. McBride, supra,* because in the instant action there is a finding that the rider was attached without the consent of Miller-Morgan.

As a matter of fact, however, precisely the same evidence was before the court in each case.

Thus, in *Stanfield v. McBride, supra,* Petitioner attempted to introduce testimony of G. C. Temple to establish that the omnibus clause was deleted without Miller-Morgan's consent, which testimony was transcribed into the record by way of proffer (R. 115-117). This evidence is substantially identical to Temple's testimony in the instant case (R. 65-72). See *Stanfield v. McBride, supra,* 149 Kan. at 569, 88 P. (2d) at 1003:

> "Appellant at the time of the trial in the garnishment proceeding offered testimony of G. C. Temple, office manager of the motor company, for the purpose of showing that the rider had been attached to the insurance contract without the knowledge of the motor company and without its assent."

Plainly the Kansas Supreme Court considered both contentions advanced by Petitioner in the instant case: that the rider was attached without consideration or mutual assent, and that Respondent was guilty of fraud.

The Kansas Supreme Court disposed of the fraud issue in these words (149 Kan. at 572, 88 P. (2d) at 1005):

> "Complaint is made of the exclusion of testimony to show the rider was attached through fraud . . .
>
> "But assuming that the agent of the insurance company [Respondent] was guilty of fraud, the endorsement by which the omnibus clause was deleted would be voidable only, not void. . . .
>
> "The evidence in this case fails to show that Miller-Morgan has elected to rescind the change in the policy. It does not show they are dissatisfied with the policy in its present form. . . . As a condition precedent to his right of recovery it was necessary for plaintiff [Petitioner] to show that the omnibus clause had

not been deleted from the original contract. That fact has not been established."

The second issue was likewise passed upon by the Kansas Supreme Court (149 Kan. at 573-574, 88 P. (2d) at 1005-1006):

> "Appellant [Petitioner] contends that the endorsement by which the coverage was deleted is void because it was unsupported by any consideration. But the question is not whether a contract or a modification thereof must be supported by consideration, but whether a volunteer who has no interest in the matter can raise the question. . . .
>
> "As he [Petitioner] had no knowledge of the contract and had in nowise changed his position by reliance thereon, and had no accrued interest in the contract, he was at that time in the position of a stranger to the contract and could not raise the question of the sufficiency of the consideration."

Respondent therefore submits there is no factual distinction between *Stanfield v. McBride, supra,* and the case at bar. It is not material that here the evidence of fraud and lack of mutual consent was introduced and held, by the Circuit Court of Appeals, irrelevant, and that in *Stanfield v. McBride, supra,* such evidence was excluded and held, by the Kansas Supreme Court, inadmissible.

In reply to Petitioner's statement (Brief, p. 26) that the holding of the Kansas Supreme Court in the Stanfield case embraced issues neither raised, briefed, nor argued, suffice to quote from the conclusion of Respondent's brief to the Kansas Supreme Court:

> "The insurance contract here involved was entered into between Miller-Morgan and Employers [Respondent]. The rider was attached to the policy,

deleting omnibus coverage, prior to the accident which gave rise to McBride's judgment against Strunk.

"With reference to that contract of insurance, McBride [Petitioner's assured] is not even a third party —it is a fourth party. By what, for want of a better term, we shall call tandem subrogation, McBride seeks to possess itself of the rights of Strunk, and, having accomplished this, then to possess itself of the rights of Miller-Morgan, and finally, having achieved both these accomplishments through its garnishment affidavit, to institute litigation against Employers to set aside the rider. McBride has not and can not produce any authority which warrants this action. *Whether it brings a direct action against Employers* or an ancillary garnishment proceeding, *McBride has no standing in court to complain of any lack of consideration or fraud affecting a contract entered into between Miller-Morgan and Employers.* The rider was attached to the policy prior to the date of the accident, *has never been objected to or set aside by Miller-Morgan,* and McBride cannot enforce its judgment against employers." (Italics added)

As for Petitioner's present "interpretation" of the Stanfield opinion as being premised entirely upon the fact that Miller-Morgan was not a party to the action, Respondent feels constrained to quote from the petition for rehearing filed by Petitioner with the Kansas Supreme Court. In that petition present Petitioner cited *Sluder v. The North Americans, supra,* and *Riddle v. Rankin,* 146 Kan. 316, 69 P. (2d) 722 (1937), among other authorities, and suggested all the dire consequences of the ruling in that case which are now pressed upon This Court. Directly to the present point, moreover, Petitioner did not then treat the Stanfield opinion as technically confined to garnishment

proceedings to which Miller-Morgan was not a party. Instead, Petitioner then interpreted the Stanfield decision exactly as the Tenth Circuit Court of Appeals interpreted it in the case at bar:

> "The basis for the court's decision in this case was its conclusion that a third party beneficiary who had no indefeasible interest in a contract cannot assert that a modification or cancellation of the contract was ineffective for want of consideration, fraud practiced upon the promisee or lack of assent of the promisee to the modification or cancellation." (Petition for Rehearing, p. 1)

Apart from this practical construction by Petitioner, Respondent submits the Tenth Circuit Court of Appeals' interpretation of the Stanfield opinion is eminently correct. The rationale of that decision, as even a cursory reading of the opinion will disclose, is not merely Miller-Morgan's absence as a litigant but, rather, its failure to attack the rider's validity.

Note, for example, the court's statement (149 Kan. at 570, 88 P. (2d) at 1004):

> "As the original parties had a right to modify or change the policy before the interest of any potential beneficiaries had accrued under the contract, it is difficult to suggest any ground upon which *the plaintiff McBride* [Petitioner] can question such change." (Italics added)

The clinching language, though, is contained on pages 573 and 574 of the opinion (88 P. (2d) at 1005-1006). The strongest argument urged by present Petitioner against validity of the rider was that it was attached without consideration or mutual assent—in which event the rider would be void, not merely voidable as in event of

fraud. In holding Petitioner could not defeat the rider even though it lacked consideration, the Kansas Supreme Court said:

> "Appellant contends that the endorsement by which the coverage clause was deleted is void because it was unsupported by any consideration. But the question is not whether a contract or a modification thereof must be supported by a consideration, but whether a volunteer who has no interest in the matter can raise the question.
>
> "We hold, therefore, that the parties had a lawful right to limit the coverage by attaching a rider to the policy, and that the plaintiff could not question the transaction. As he had no knowledge of the contract and had in nowise changed his position, he was at that time in the position of a stranger to the contract, and could not raise the question of the sufficiency of the consideration."

How, Respondent inquires, could the court's holding be made clearer? "We hold," the court states, thereby adopting the strongest language available to appellate tribunals. What is held? "We hold . . . that the plaintiff could not question the transaction . . . he was . . . in the position of a stranger to the contract, and could not raise the question of the sufficiency of the consideration."

This holding is not restricted to litigation in which Miller-Morgan is not a party. The stated basis for the decision is that *Petitioner is a stranger to the contract* and therefore has no standing to attack the rider—and that is certainly true whether Miller-Morgan is or is not a party to the suit in which Petitioner attempts to maintain such attack. *Petitioner's relationship to the insurance contract cannot possibly be affected by the identity of the parties to a law suit.*

Why does the Kansas Supreme Court, then, emphasize the fact that Miller-Morgan was not a party to that action? Because, not being a party thereto, Miller-Morgan was not therein exercising its right of rescision. And since that right was Miller-Morgan's, not Petitioner's, and could be exercised only by Miller-Morgan, judgment was entered for Respondent. In this connection, notice these excerpts from the Kansas Supreme Court opinion:

> "But assuming that the agent of the insurance company was guilty of fraud . . . *The evidence in this case fails to show that Miller-Morgan has elected to rescind the change in the policy.*" (149 Kan. at 572; 88 P. (2d) at 1005)
>
> "The Miller-Morgan Motor Company are not parties to this lawsuit. The policy was issued to them. *They have made no complaint as to the change in the policy,* and, so far as the record shows, they were satisfied with the deletion of the omnibus clause." (149 Kan. at 570; 88 P. (2d) at 1003-1004)
>
> "They [Miller-Morgan] are not parties to the present proceedings. As the original parties had a right to modify or change the policy before the interest of any potential beneficiaries had accrued under the contract, it is difficult to suggest any ground *upon which the plaintiff McBride* [Petitioner] can question such change." (149 Kan. at 571; 88 P. (2d) at 1004)

Certainly no extended argument is necessary to establish that Petitioner cannot avoid the Stanfield opinion merely by joining Miller-Morgan's successors as *passive* parties defendant in the case at bar. Were those successors parties *plaintiff,* or had they cross-petitioned for the affirmative relief or rescission, a different problem would have been presented. But the instant record contains no evidence of Miller-Morgan's desire to rescind.

Not one of the Miller-Morgan successors named herein as defendants even filed an answer (R. 125). Nor was there any occasion for their doing so since Petitioner's petition prayed for no relief whatever against them (R. 12-13). Of those five successor-trustees (R. 7, 64), only two testified. W. F. Miller testified that at no time, either as president of Miller-Morgan or as trustee of the defunct corporation, had he ever complained of the rider (R. 77). Mr. Morgan testified to the same effect, admitting that to his knowledge Miller-Morgan had never taken steps to rescind, and that he, personally, had no present complaint (R. 92; 113-114). Hence, not only is the instant record barren of evidence that Miller-Morgan has elected to rescind, but it affirmatively shows Miller-Morgan has *not* done so.

The basic premise, Respondent submits, of the Stanfield decision is that only Miller-Morgan has any standing in court to attack the rider. Under no circumstances can Petitioner, a stranger to the policy, do so. That the Stanfield case was a garnishment action was material *only* because Miller-Morgan was not a party thereto and the proceedings therefore lacked the only litigant capable of attacking the rider. And, in turn, Miller-Morgan's absence from the suit was material *only* because it was therefore not itself seeking rescission therein. Hence, both the "garnishment" and "party" features of the Stanfield case were material for one and the same reason: Miller-Morgan, the only person capable of doing so, was not a litigant therein seeking rescission of the rider.

By the same token, under the Stanfield case the rider's invalidity is not an issue available to Petitioner in *any* action unless and until Miller-Morgan is made a party thereto *and elects therein to litigate the issue of the rider's validity.*

Petitioner failed in the Stanfield case because Miller-Morgan was not a party thereto and was therefore not seeking rescission therein. It was inevitable that Petitioner must fail again in the case at bar because Miller-Morgan, although made a party hereto by the summoning of its successors, did not seek or elect herein to avoid the rider or litigate the issue of the rider's validity. Merely joining the Miller-Morgan successors as passive parties defendant herein is no substitute for the requisite proof of an election by Miller-Morgan to avoid the rider.

Therefore, Respondent submits, the Tenth Circuit Court of Appeals did not do "violence" to the Stanfield opinion, but, on the contrary, very properly entered judgment against Petitioner.

V.

Conclusion.

Petitioner's brief fails to demonstrate any conceivable conflict between the decision of the Tenth Circuit Court of Appeals and decisions either of the Fourth Circuit Court of Appeals or of the Kansas Supreme Court.

At best, Petitioner suggests only that the Tenth Circuit Court of Appeals, in ascertaining and applying Kansas law, misinterpreted the decision in *Stanfield v. McBride, supra.* Whether or not any such error would solicit the issuance of a writ of certiorari, Respondent submits that unquestionably the Tenth Circuit Court's interpretation of the Stanfield opinion is entirely correct.

Wherefore, it is respectfully submitted that the petition for writ of certiorari be denied.

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